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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
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12 FORTINET, INC.,)

13 Plaintiff,)

14 v.)

15 PALO ALTO NETWORKS, INC., et al.,)

16 Defendants.)
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Case No.: C 09-0036 RMW (PVT)

**ORDER RE PARTIES' PROPOSED FORM OF
PROTECTIVE ORDER**

18 On December 15, 2009, the parties filed a [Proposed] Stipulated Protective Order. As
19 drafted, the proposed form of order is not acceptable to the court.¹ Based on the form of order
20 submitted,

21 IT IS HEREBY ORDERED that no later than January 8, 2010, the parties shall submit a
22 revised form of order that tracks the language of the court's model form of protective order, with the
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24 ¹ Among other things, the proposed form of order: 1) does not limit protection to
25 information that warrants protection under Federal Rules of Civil Procedure 26(c); 2) in effect provides
26 only an "Attorneys' Eyes Only" level of protection; 3) does not impose an appropriate duty to avoid
27 inadvertent disclosure of privileged information; 4) allows parties to unilaterally determine what
28 information is not subject to the order due to prior or public disclosure, rather than requiring the parties
to follow the procedure for challenging the designation; 5) prohibits a party from complying with valid
subpoenas in other actions; 6) improperly allows a party to the action to withhold responsive documents
or information based on nothing more than a third party's "confidentiality rights" and instead forces the
propounding party to seek discovery from the third party; and 7) allows the parties to modify a court
order without court approval of the proposed modifications.

1 following modifications:

- 2 1.) The parties may include in the protective order the procedures set forth in Paragraph 5
3 of their proposed form of order regarding the handling of computer source code and
4 other hardware descriptive language ("Source Code"), provided that the provision
5 must make clear that only such Source Code that warrants protection under Federal
6 Rules of Civil Procedure 26(c) is covered; and
- 7 2.) The parties may include a provision to govern the inadvertent disclosure of privileged
8 or work product information that reads as follows:

9 "Each party shall make efforts that are 'reasonably designed' to protect
10 its privileged materials. *See Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th
11 Cir. 2001). What constitutes efforts that are reasonably designed to protect
12 privileged materials depends on the circumstances; the law does not require
13 'strenuous or Herculean efforts,' just 'reasonable efforts.' *See, e.g., Hynix*
14 *Semiconductor, Inc. v. Rambus, Inc.* 2008 WL 350641, *1-*2 (ND Cal., Feb.
15 2, 2008); *see also*, FED.R.CIV.PRO. 26(f)(3) advisory committee's notes to
16 2006 amendments (discussing the substantial costs and delays that can result
17 from attempts to avoid waiving privilege, particularly when discovery of
18 electronic information is involved). When a particular Rule 34 request
19 requires a production or inspection that is too voluminous, expedited or
20 complex (such as certain electronic productions) to allow for an adequate pre-
21 production review, the parties may enter into non-waiver agreements for that
22 particular production. If the requesting party is unwilling to enter into such an
23 agreement, the Producing Party may move the court for a non-waiver order.

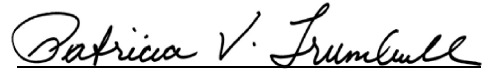
24 "In the event that, despite reasonable efforts, a Producing Party
25 discovers it has inadvertently produced privileged materials, then within 30
26 calendar days the Producing party shall notify the Receiving Party that the
27 document(s) or materials should have been withheld on grounds of privilege.
28 After the Receiving Party receives this notice from the Producing Party under
this paragraph, the Receiving Party shall not disclose or release the
inadvertently produced material to any person or entity pending resolution of
the Producing Party's claim of privilege. The parties shall hold a meet and
confer, as defined in Civil Local Rule 1-5(n), as soon as reasonably possible
after a notice of inadvertent production. If the Producing Party and Receiving
Party agree that the inadvertently produced material is privileged, and was
disclosed despite efforts by the Producing Party that were 'reasonably
designed' to protect the materials, then the Receiving Party shall return or
certify the destruction of all copies (including summaries) of such material. If
no agreement is reached, then within 10 court days after the meet and confer,
the Producing Party must seek a ruling from this court to establish that the
material is privileged and that the Producing Party did not waive the privilege
by inadvertently producing the material. If the Producing Party seeks such a
ruling, the Receiving Party shall not disclose or release the inadvertently
produced material to any person or entity pending the court's ruling on the
Producing Party's motion."

IT IS FURTHER ORDERED that, pending entry of the final form of protective order, the
court's model form of protective order, as modified herein, shall govern the handling of confidential
information exchanged or disclosed during discovery in this case.

IT IS FURTHER ORDERED that, in the event the parties want any other modifications to

1 the court's model form of protective order, they shall file a joint statement setting forth the reason(s)
2 for the requested modification(s).

3 Dated: 12/18/09

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5 PATRICIA V. TRUMBULL
6 United States Magistrate Judge
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